IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 264 of 1995

Shri Shivaji appa Pawar ...Appellant

(Original applicant)

V/s

Sou.Pushpa Shivaji pawar ...Respondent

(Original opponent)

Shri A.V.Anturkar for Appellant

Shri Vijay Patil for Respondent

CORAM:S.R.SATHE,J.

DATED:25th Aug.2004

ORAL JUDGMENT :-

1. Being aggrievevd by the judgment and order passed by the court of 2nd Additioanl District Judge, Satara in Civil Appeal No.120 of 1994 whereby the order passed by the Court of the Civil Judge, S.D., Satara in H.M.Petition no.4 of 1990 declaring the marriage of appellant with respondent

solemnised on 1-4-1989 as nullity, was set aside and appeal was allowed, the husband has filed this second appeal.

2. For the sake of convenience hereinafter the parties shall be referred to as the Appellant and respondent.

3. Brief facts giving rise to this second appeal are as under :-

. On 25-3-1989 the appellant after meeting the respondent, approved the proposal for marriage. On 1-4-1989 marriage between appellant and respondent took place at Hol Circle, Taluka Phaltan, District Satara. At that time the appellant was serving at Mumbai. On 3-4-1989 there was Satyanarayan Puja at the house of the appellant. The appellant was therefore expecting cohabitation with respondent on that day. However, on that very day after the religious ceremony was over menstruation period of respondent started and as such there was no cohabitation for 4/5 days after the marriage. The appellant went to Mumbai to resume his duties and within short period the respondent went to her maiden home at Jinti. Thereafter she avoided to return to her matrimonial home on the ground that

she was suffering from pain in abandon. On 12-6-1989 respondent's brother sent telegram to appellant informing that respondent is ill. Appellant husband came to know about the same and he went to village Jinti in the month of June 1989. At that time he found that respondent wife was lying on cot by covering her body with shawl. He asked his wife to consult doctor. However, respondent avoided to go to doctor by saying that there was no any serious ailment. Again in the month of July 1989 when appellant had been to the house of in laws to enquire about the health of respondent, she was again found sleeping on the pretext that she was suffering from pain in abandon. Thereafter the brother of respondent had sent letters to the appellant husband and requested him to send money for medical treatment of respondent. The appellant had also given money to meet the medical expenses of his wife. At that time also respondent wife refused to go along with the appellant at Mumbai or at Phaltan. Thereafter on 30-10-1989 Shivaji Miskar, friend of appellant, informed him that respondent has delivered a male child on 25-10-1989 at Omkar Hospital, Phaltan. The appellant was shocked when he heard the said information because according to him there was no cohabitation between respondent and him and

Respondent had also never disclosed to him or his family members about her pregnancy. The appellant therefore went to respondent and asked her about the child and on that respondent wife admitted her guilt. Appellant felt that he was cheated by his wife and she was in fact pregnant from some other person on the date of her marriage with him. He therefore filed Petition under Section 12(1)(d) of Hindu Marriage Act, 1955 for annulment of the marriage by alleging that respondent was at the time of marriage pregnant from some person other than the appellant.

4. The respondent wife filed her written statement at Exh.32 and resisted the petition. She admitted that her marriage with Appellant took place on 1-4-1989 and also admitted that there was no cohabitation till 3-4-1989 as Satyanarayan Puja was to be performed. She however contended that after her menstruation period was over on 8-4-1989 the appellant had intercourse with her. Not only that but thereafter for a period of 10/12 days, before the appellant went to Mumbai to resume his duties, they had intercourse. She also admitted that her brother had sent letter to the appellant and requested appellant to give money for her medical treatment, and that she delivered a male child on

25-10-1989. She however contended that it was premature delivery but since then her husband i.e. appellant started looking at her with suspicion. She denied the allegations made against her in the petition and contended that the said allegations are false and baseless and the child born to her is from the appellant. She therefore prayed for dismissal of the petition.

5. On these pleadings the trial Court framed the issues at Exh.36 and after considering the oral and documentary evidence adduced by both the parties the trial Court came to the conclusion that the appellant succeeded in proving that the respondent was in fact pregnant from some other person at the time of her marriage with appellant. The trial Court also held that the appellant has proved that he had no access at the relevant time to the respondent. Naturally, the trial Court decreed the petition in favour of the appellant.

6. Being aggrieved by the above order the respondent wife filed Civil Appeal No.120 of 1994 in the District Court at Satara. After hearing the arguments advanced by both the parties, the first appellate Court came to the conclusion that finding recorded by the trial Court was erroneous and there

was no sufficient evidence adduced by the appellant to prove that the respondent was pregnant from some other person than the appellant, when her marriage with Appellant took place. The first appellate Court also observed that the appellant has failed to prove that he had no access to the respondent at the relevant time. The first appellant court therefore allowed the appeal and set aside the order of annulment of marriage passed by the trial Court and dismissed the petition filed by the appellant.

7. It is this order that is being challenged by the appellant husband in this second Appeal.

8. At the time of admission, this Court has passed the following order :

> "Admit. Grounds 1 to 7 substantial questions of law".

The Grounds 1 to 7 read as under :-

1. The Appellant submits that the controversy in the matter is that whether the child which is born on 25th September 1989, was the child which was begotten by the appellant and whether the

Respondent was pregnant at the time of the solemnization of the marriage, which had taken place on 1st April 1989.

2. It is admitted by the Respondent in her written statement at Exh.32, as well as in the deposition that the sexual intercourse for the first time had taken place on 8th April 1989. Even if it is assumed for the sake of argument that the conception of the child has taken place on 8th of April 1989. Even if it is assumed for the sake of argument that the conception of the child has taken place on 8th of April 1989, the child is born of 25th Oct. 1989, According to the deposition of Dr.Sneha (Onkar Ruganalya - Waikar Hospital Phalthan, Dist.Satara), the child is a full grown baby. She has clearly stated in her deposition that the child is 36 week old child. She has also stated that the weight of the child is 2 Kg. This is corroborated by the certificate given by Dr.Sneha.This itself shows that on the date of the marriage, the Respondent was pregnant. If the period of 36 weeks is computed way back from 25th Sept. 1989, then the date of the conception will proceed the date of the solemnization of the marriage, which has taken place on 1st April 1989. On this admission itself, the appellant is entitled

to get the declaration under Section 12 of the Hindu marriage Act.

3. That the learned Additional District Judge has erred in not appreciating that the evidence about the blood group is produced in the instant case. The phenotype of the Appellant and the Respondent was B-RH+. The Appellant submits that if the phenotype of both the parents is B-RH+, then it is impossible to have a child with AB +. In the instant case, the child Amar is having the blood group as AB +. This is medically impossible, therefore, that the Appellant could the father of the said child. It is obvious that some other person is the father of the said child.

4. This fact is proved by the deposition of Dr.Sanjay Gaikwad, who has been examined at Exh.73, as well as the certificate which was given by him. The said certificate was given in Misc. Application No.34 of 1990, which after remand has been requisitioned by the learned Civil Judge, Senior Division, from the Court of the learned judicial Magistrate, First Class.

5. The learned Additional District Judge has erred in discharging the said certificate. The learned

Judge has also erred in discarding the evidence of Dr.Sneha.

6. The learned Additional District Judge has erred in not relying upon Chapter 5, Page 93 of Modi's Text Book of Medical Jurisprudence.

7. The learned Additional District Judge has erred in paragraph 16 of the impugned judgment in coming to the conclusion that on account of the order passed by the learned Additional District Judge in the earlier Appeal viz. Civil Appeal no.87 of 1991, the scope of the enquiry after remand is confined only to the M.N Test and the Genetic Test. It is submitted that this is incorrect. For the purpose of finding out the scope of the enquiry after remand, it is necessary to read the entire judgment given in Appeal No.87 of 1991. The entire judgment, particularly the observations, in paragraph 11 of the said judgment will clearly indicate that it was not intended that after remand, it is only the genetic test and the MN test, should be conducted but even the blood group test was also included".

8. As mentioned above, though it was observed that grounds 1 to 7 are substantial questions of law,

Mr.Anturkar, learned Advocate for the appellant husband has in fact urged only two points before me. Firstly, he submitted that finding recorded by the first appellate court to the effect that the appellant has failed to prove that the respondent was at the time of marriage pregnant by some person other than the appellant is not legal and correct and not borne from the evidence on record. Secondly, he canvassed before me that finding recorded by the first appellate court to the effect that the appellant had no access to the respondent wife during the time when child Amar was begotten is also not legal and correct. As against this the learned Advocate for the respondent wife supported the judgment and order passed by the first Appellate Court.

9. It is not in dispute that marriage between appellant and Respondent was solemnized on 1-4-1989 and thereafter respondent started residing in the house of appellant and on 3-4-1989 there was Satyanarayan Puja at the residence of appellant. It is also an admitted fact that since prior to the marriage appellant was serving at Mumbai and respondent never went along with appellant to Mumbai. Admittedly, there was no sexual inter course between the appellant and respondent prior

to marriage or after marriage till 3-4-1989. Of course, it is the case of respondent wife that appellant had intercourse with her after her menstruation period was over on 8-4-1989 and thereafter for about 10/12 days. However, the appellant has alleged that there was no such intercourse and he had gone to Mumbai 4/5 days after the marriage. It is also admitted that on 25-10-1989 the respondent gave birth to a male child in Hospital of Dr.Sneha Sidhaye at Phaltan and it was not normal delivery but she had to undergo scissorian. It is very clear that within 6 months 25 days the respondent wife has given birth to a male child. According to respondent the first sexual intercourse had taken place on 8-4-1989 so the child was born after 199 days from the first intercourse with appellant. So the appellant has denied the paternity of the said child and contended that respondent was in fact pregnant form some other person than the appellant when his marriage with respondent took place. In order to succeed in getting a decree under Section 12(1)(d) the appellant has to prove that respondent was at the time of marriage pregnant from some person other than the appellant. So, we have to find out what evidence has been adduced by the appellant while relying on the provisions of Section 112 of

Indian Evidence Act 1872 which runs as follows :-

> 112. Birth during marriage, conclusive proof of legitimacy - The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when it could have been begotten.

10. It is an admitted fact that child in question was born during the continuation of a valid marriage between his mother and appellant and as such it has to be presumed that the said child is legitimate child of appellant. If appellant wants to challenge the paternity of the said child then he must prove that he and respondent had no access to each other at any time, when the child in question could have been begotten. So, I think that entire fate of this appeal depends on the point as to when child in question has begotten.

11. In order to point out the period when child

was begotten , the appellant has examined Dr.Sneha Sidhaye, in whose hospital, scissorian operation of respondent took place and she gave birth to a male child. Dr. Sidhaye has stated that delivery of respondent was not premature and child was of fully matured period of 9 months. If it is so, then obviously one will have to say that the said child is not from the appellant. Because, admittedly the parties had no sexual intercourse with each other prior to their marriage which took place on 1-4-1989. As against this, it is the contention of the respondent that it was her premature delivery and it was not fully matured child but fetus was at the most of 199 days. If it is so, then of course relying on provisions of section 112 of Indian Evidence Act it has to be said that it is legitimate child of the appellant. In fact the trial Court has held that child in question was of matured period while appellate Court held that there was no sufficient evidence to show that child was of matured period. Dr.Sneha Sidhaye has produced the case papers of respondent wherein it is mentioned that fetus was of 36 weeks. However, if we see the entire deposition of witness Dr.Sneha Sidheye Exh. 2 and the case papers, the weight of child is written as "2 Kg.." In fact it appears that there is some over writing in the figure "2".

Initial figure must have been "1", thereby justifying that it was premature delivery. The question arises as to whether a child of 199 days can survive. When attention of Dr.Sneha Sidhaye was drawn to some propositions laid down in Modi's Medical Jurisprudence and Toxicology, it seems that she has admitted that even a child born after period of 174 days pregnancy can also survive. In the instant case merely because the child has survived we cannot jump to the conclusion that the child was of matured period. In Modi's Medical Jurisprudence some instances are quoted wherein child of even 26 weeks of pregnancy had survived. From evidence of Dr.Sneha Sidhaye it is very clear that she had never examined respondent prior to time she was admitted in her hospital for delivery. In fact for that matter the respondent has not adduced any evidence to show that she was examined by any other doctor. Nor the respondent has stated in her evidence that she was examined by any particular doctor from time to time. If such evidence would have been available then it was easy to detect the period of pregnancy. It is needless to say that as per medical science -- the age of foetus can be determined from its length, weight and other characteristics. There are some other factors such as whether the child cried immediately

after the birth to determine the duration of fetus. However, in the instant case we find that Dr.Sneha Sidhaye has not at all examined the child, she has not uttered a single word about all these factors. So one does not know on what basis it has been mentioned in the case paper that fetus was of 36 weeks. So, the first appellate Court has rightly held that evidence of Dr.Sneha Sidhaye was not at all sufficient to prove that child in question was of full matured period or that fetus was of 36 weeks. Naturally it can not be held that respondent was pregnant on the date of her marriage with appellant.

12. There are various circumstances on record which would also indicate that child in question was not of full maturity period. The conduct of parties would also go to show that in all probabilities the child in question was not of full maturity period and it was in fact premature delivery wherein the pregnancy period was hardly 190/199 days. It is the case of the appellant that it is only after the time he was informed by his friend on 30-10-1989 that respondent has given birth to a male child he came to know about the child and in fact about the respondent’s pregnancy. If really the child would have been of full

maturity period i.e. of 36 weeks then obviously it can be said that there was every possibility for the appellant to know about the pregnancy when he met the respondent at the time of marriage or atleast at the time when he had been to the house of respondent's parents in the month of June, July and August. Not only that but if at the time of marriage respondent would have been pregnant then even the other family members of appellant would have come to know about the respondent's pregnancy. But that has not happened. That is obviously because at the time of marriage she was not pregnant.

13. The respondent has stated in her deposition at Exh.45 that she was not pregnant at the time of her marriage. She had sexual intercourse for the first time with appellant on 8-4-1989 and thereafter for about 10/12 days. Though the appellant has contended that he went to Mumbai 4/5 days after marriage he has not adduced any specific evidence in that behalf. Nor he has given the exact date on which he left his house. It is very difficult to believe that appellant had no sexual intercourse with respondent even after her menstruation period was over. In fact as per provisions of Section 112 of Indian Evidence Act it is not necessary to prove

the sexual intercourse during relevant period. Access and non access means the existence or non existence of opportunities for sexual intercourse and it does not amount to actual cohabitation. So, when marriage had taken place on 1-4-1989, Santyanaraya puja was performed on 3-4-1989 and thereafter for few days the appellant and respondent had stayed together, it must be said that there was an opportunity for sexual intercourse and as such the appellant had access contemplated under Section 112 of Indian Evidence Act. Admittedly in the month of June, July and August 1989 the appellant had gone to the house of respondent so it is very difficult to believe that at that time he had no knowledge about the pregnancy of the respondent or that during that period, respondent had tried to conceal her pregnancy. Then we find that brother of the respondent had specifically written letter to the appellant that respondent is in need of money to meet the medical expenses and appellant had accordingly paid the amount. It is difficult to believe that he had not come to know the illness of respondent or for what purpose the medical help was required. If the appellant had suspicion to the effect that respondent was concealing something from him then he would have insisted the respondent

and taken her to doctor. But that has not happened. This in fact suggests that appellant had also an idea about the pregnancy of the respondent. So, merely because in the letters which were written by the brother of the respondent to appellant it was not specifically mentioned that respondent was pregnant it cannot be said that respondent and her brothers wanted to conceal the fact of pregnancy of the respondent. Looking to the conduct of the appellant one has to say that the appellant must be having an idea about the respondent's pregnancy and that is why the brother also did not feel it necessary to specifically mention in the letter about the respondent's pregnancy. Non mention of pregnancy in the said letters will certainly not help the appellant to prove his case.

14. There is yet another circumstance which also shows that respondent must not be pregnant at the time of marriage and there was nothing suspicious when she gave birth to a child. We find that even after the time the appellant was informed about the delivery of respondent which had taken place within 200 days from the marriage, he did not take any action against the respondent immediately. On the contrary, we find that it was respondent who first

issued notice to the appellant and asked him to maintain her. It is only thereafter the appellant filed present petition for annulment of the marriage on the grounds mentioned in section 12(a)(d) of the Hindu Marriage Act. If really the appellant had any doubt about respondent's chastity and there was no sexual intercourse with respondent at any time he would have definitely made a grievance to respondent's parents about respondent giving birth to a child and taken some legal action against respondent. But we find that he kept mum for a long period. So, this inaction on his part also indicates that there is no sustenance in the contention of the appellant.

15. It was argued on behalf of the appellant that the blood group of the appellant is B-RH positive, respondent's blood group is B-RH positive while blood group of child in question is AB positive. As per evidence of Dr.Gaikwad and his report Exh.74 there is no chance of a child having AB Rh positive group when the parents are of BRH positive group. So, relying on this it was argued that child in question was not of appellant. However, it must be noted that it is well settled that blood group test is not a conclusive test and merely on the blood group examination one cannot positively decide the

question of paternity. The evidence of Dr.Gaikwad is not accepted by the first appeal Court as the same is not convincing. Merely from that test one cannot conclusively say that appellant must not be the father of Amar. In fact Dr.Gaikwad had suggested DNA test and the respondent had even shown the willingness to undergo the test but the same could not be carried out. Thus we find that the first appellate Court after carefully scrutinising the entire evidence and considering the position of law observed that the appellant has failed to adduce cogent evidence to prove that he had no access to the respondent during the period when the child could have begotten and consequently failed to prove that at the time of marriage respondent was pregnant from some other person than the appellant. There is no reason to interfere with the said finding of the first appellate Court.

16. In this view of the matter there is no substance in this appeal. Hence the appeal is dismissed with costs.

(S.R.SATHE,J.)

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

CRI.WRIT PETITION NO. 208 of 1997

Shri Shivaji Appa Pawar ..Petitioenr

V/s

1. Pushpa Shivaji Pawar

2.Amar Shivaji Pawar

3.State of Maharashtra .. Respondents

Shri Anil A. Anturkar for Petitioner

Shri Vijay Patil for Respondent nos.1 and 2

CORAM:S.R.SATHE,J.

DATED: 25th Aug.2004

ORAL JUDGMENT :-

1. Being aggrieved by the judgment adn order passed by the Court of the Additional Sessions Judge, Satara in Criminal Revision Petition No.201 of 1995 whereby the orde rpassed by the Court of the JudicialMagistrate, First Class, Phaltan dated 27th July 1995 in Criminal Misc. Application No.34 of 1990 directing the Petitioner husband to pay

maintenance of Rs.250/- per month to wife and rs.150/- per month to child was confirmed and revision petition was dismissed. The husband Petitioner has filed this Criminal writ petition and prayed that the application for maintenance filed by the wife be dismsised.

2. For sake of conve ience hereinafter the parties shall be referred to as the Petitioner husband and Respodnent wife.

3. Brief facts giving rise to this writ petition are as under :

. The marrige between Petitioner and Respondent took place on 1-4-1989. After marriage Respondent wife started residing with Petitioner husband at Hol Cirle, Taluka Pahltan, District Satara for initial few days she was treated well but thereafter husband started hrassing her. Whenever he used to come from Mumbai he used to ill-treat her. According to Respondetn wife when she was pregnant. The Petitioenr drove her out of house and she was constrained to stay with her parents' home. Thereafter on 25-10-1989 she delviered a male child. However,neither the Petitioner nor his parents came to see the Respodnent. Respondent's

parents also requested

the Petitioner to take her with him. However, he refused. The Respondent wife therefore issued notice dated 28-12-1989 to the Petitioner husband and called upon him to take her with him. The Petitioner husband replied the said notice and denied the paternity of the child (original applicant no.2). Naturally the Respondent wife was shocked to see the attitude of the Petitioner husband. For that Petitioner husband was not ready and willing to maintain her. She filed Criminal Misc. Application NO.34 of 1990 under Section 125 of Cr.P.C. and claimed maintenance of Rs.500/- p.m. for herself and Rs.200/- per month for child i.e. original applicant no.2.

4. The Petitioner husband filed his say Exh.9 and admitted the relationship with Respondent but contended that he had never sexual intercourse with Respondent wife and denied the paternity of the child. He also contended that a she had filed petition under Section 12(b) of Hindu Marriage Act the wife filed application under Section 125 of Cr.P.C.. According to him there was absolutely no reason for her to claim any maintenance. He also contended that he is not in a financial position to

pay maintenance a sprayed. Hence on all these grounds the Petitioner husband prayed for dismissal of the application.

5. After considering the evidence adduced by both the parties the learned Judicial Magistrate, F.C., came to the conclusion that the Petitioner is the father of the child and the Respondent wife is unable to maintain herself. He also held that the Petitioner husband refused and neglected to maintain the Respondent wife. He therefore directed the Petitioner husband to pay maintenance of Rs.250/- per month to wife and Rs.150/- p.m. to son.

6. Being aggrieved by this order the Petitioner husband filed Revision Application No.201 of 1995 in the Court of the Additional Sessions Judge, Satara. After hearing arguments of both the learned Advocates the Additional Sessions Judge came to the conclusion that the Petitioner husband is the father of applicant no.2 and he has refused and neglected to maintain his wife i.e. present Respondent. He therefore, confirmed the order passed by the learned Judicial Magistrate, F.C..

7. It is this order that is being challenged in

this criminal appeal.

8. In this petition before me the learned Advocate for the Petitioner has urged two points. Firstly he submitted that Respondent wife was in fact pregnant at the time of her marriage with Petitioner took place and applicant no.2 is not begotten from him and under such circumstances the Petitioner husband is not liable to pay any maintenance.

9. As against this the learned Advocate for the Respondent wife supported the judgment and order passed by the Court of Additional Sessions Judge, Satara and submitted that Criminal writ petition be dismissed.

12. Thus it is very clear that the order passed by the Court of the Additional Sessions Judge, Satara is legal and correct. there is no necessity to interfere with the same. Hence the writ petition is dismissed and the Petitioner is directed to pay cost of Rs.500/- to the Respondent wife.

13. Certified copy expedited.

(S.R.SATHE,J.)